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9 February 2005

Federal Communications Commission

Re: Proceeding 05-49

I am writing in regards to the Commission's request for comments on the proposed regulations governing the implementation of the "significantly viewed" portions of SHVERA and the list included therein.

A. Comments on the accuracy of The List

In Paragraph 14 of Notice FCC-05-24, the Commission requests comments regarding the accuracy of the list of "significantly viewed" stations ("The List"), in light of the age of its predecessor and changes in the marketplace since its predecessor's release.

Some apparent potential discrepancies I have observed include:

- No information is included for Alaska
- Broomfield County is not included in The List
- Dade County Florida is now officially known as Miami-Dade County
- WWLP and WGGB-TV, both licensed to Springfield, MA should be considered "significantly viewed" in certain towns in northern Hartford County, Connecticut (e.g. Enfield, Suffield, East Windsor, Windsor Locks) by virtue of those towns falling within the Grade A contour of these major network affiliates, and by virtue of these stations being carried on local cable systems.
- Spanish-language stations, noncommercial stations and recently licensed stations, appear to be largely missing from The List (see below).
- WB and UPN affiliates from out-of-market are frequently carried by rural cable systems when no local affiliate is available. Given the penetration of CATV in rural communities, I would suggest that under those circumstances those stations are "significantly viewed" in those communities and should therefore be included in The List. (See also below.)

B. Examples of proposed "significantly viewed" definitions creating an unfair or geographically inconsistent Competitive environment

Those last two points partially highlight some of the shortcomings of the Commission's definition of "significantly viewed". Although the Commission has requested comments only on the accuracy of The List, challenges to that accuracy necessarily require an expression of concern as to the definitions used to compile that list.

As I reviewed The List, I noticed a few things:

- Spanish-language and noncommercial stations are largely absent from The List, which seemingly places them in a different competitive environment than the English-language commercial stations that dominate The List and the market in general.
- Recently licensed stations also appear to be absent from The List, presumably because they are "too new" to have achieved sufficient viewership to qualify as "significantly viewed". This places them at a competitive disadvantage to older, more established stations.
- In many locales, out-of-market network stations not included on The List are carried by local cable companies. DBS service providers appear to be denied permission to carry those stations, placing DBS companies at a competitive disadvantage, a situation contrary to the intent of Congress.

Specific examples of these observations include:

- Adelphia's CATV system in Enterprise, AL (a part of the Dothan, AL DMA) carries the signal of WRJM, the UPN affiliate from Montgomery, AL. Under the current "Significantly Viewed" standard and SHVERA, DBS operators would be unable to provide WRJM to customers in Enterprise.
- In Northhampton, MA, (part of the Springfield-Holyoke, MA DMA) Comcast delivers the signal of WBZ and WSBK (CBS and UPN from Boston), neither of which are included in The List. Here again, DBS providers would be at a competitive disadvantage.
- In Windsor Locks, CT (part of the Hartford DMA), Cox carries WGBY, WDMR, WWLP and WGGB (Springfield's PBS, Telemundo, NBC, and ABC affiliates). They aren't on The List for Hartford County.
- South Lake Tahoe, CA is part of the Sacramento DMA. However Charter carries the following broadcast stations from out-of-market -- Reno's KTVN, KRNV, KNPB, KAME, KOLO, KREN, KRXI, KAZR (7 English language networks + Azteca), and KGO (San Francisco's ABC affiliate).
- The List includes no "significantly viewed" claims in the area due to cable penetration in excess of 90% of the market.
- Lee Vining, CA, part of the Los Angeles DMA, has the unique situation of having none of its in-market stations carried on cable or considered "Significantly Viewed". Local cable carries ABC, CBS, and NBC programming out of Denver. In this community, cable and satellite would compete on vastly different terms.
- WCVB-TV, licensed to Boston, MA is not considered "Significantly Viewed" in Bristol County, RI (a part of the Providence DMA), even though it is considered "Significantly Viewed" in New London County, CT (a part of the Hartford-New Haven DMA), a county more distant from Boston than Bristol is.

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C. Suggested revisions to the "Significantly Viewed" standard

Given all of the above observations, I believe the definition of "significantly viewed" ought to be revised to provide a more balanced competitive environment among broadcasters, CATV operators, and DBS providers, thereby satisfying Congressional intent.

I recommend that Section 76.54(a) be rewritten to read:

(a) For any given actual or potential cable subscriber or satellite subscriber, a signal shall be deemed to be significantly viewed if:

(1) The broadcasting station is assigned to the local market to which cable or satellite service is being provided; or

(2) The broadcasting station is listed as significantly viewed in the county (or community within the county) where service is being provided in Appendix B of the memorandum opinion and order on reconsideration of the Cable Television Report and Order (Docket 18397 et al.), FCC 72-530, and those listed in the Significantly Viewed List, Appendix B of the SHVERA Report and Order Implementing Section 340 of the Communications Act XX FCC Rcd XXXXX (2005); or

(3) Service is to be provided to a location within

(a) the predicted Grade B contour of the station; or

(b) for stations broadcasting only a digital signal, the noise-limited service contour as defined in section 73.622(e)

or

(4) The station is geographically the closest affiliate of the network to which it belongs, provided

(a) that no affiliate of that network is assigned to the market in which service is being delivered, and

(b) stations deemed significantly viewed solely under section 76.54(a)(4) shall no longer be deemed significantly viewed 60 days after

(i) the network assigns an affiliate to that market; and

(ii) the affiliate has actually begun broadcasting network programming;

or

(5) The station is already available via a competing cable or satellite system at the address to which service is to be provided, unless the station was made available on that competing service solely on the basis of section 76.54(a)(4)

This proposed revision should not be viewed as a significant expansion to the environment prescribed by SHVERA.

Please note that the first two points do not impact the stations permitted to be carried by cable or satellite operators.

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Point 3 simply permits cable or satellite operators to deliver signals that the consumer could already reasonably be expected to receive over the air with an antenna. I can imagine that some local broadcasters would object to this provision. However, I note that most stations receivable at Grade B levels already qualify as "significantly viewed" on The List. Those that don't already qualify are primarily newer stations, noncommercial stations, or Spanish language stations; for which this guideline would permit them to compete from an equal footing as more established English-language commercial stations.

(At a minimum, I'd like a DBS provider to be allowed to provide the two Grade A signals I receive over-the-air at home -- WGGB and WLNY -- which they wouldn't be allowed to provide with "significantly viewed" defined as in FCC-05-24!)

Point 4 also may initially be perceived as increasing competition on in-market stations. However, I submit that it either maintains the status quo (c.f. cable operators who today bring in an out-of-market WB, UPN, or Spanish-language station where no local affiliate exists; or cable and DBS operators who operate their own in-system affiliates or carry a national feed), or it fosters increased choices to consumers without impacting network exclusivity. Should a local broadcaster feel negatively impacted by this criterion, they could always become the local affiliate, say perhaps by using a sub-channel of their new digital broadcast.

Point 5 is intended simply to put cable and satellite operators on equal competitive footing. I would expect that this point is already effectively redundant with Points 1 through 4. However if consolidation in the cable industry continues, situations could arise where DBS operators must compete against cable systems whose headends lie in locations where the availability of additional broadcast stations is perceived as "more desirable" to the consumer.

Point 5 could be enhanced with a directive instructing DBS operators to permit CATV systems to redistribute, at minimal cost, the DBS carriers' signals of broadcast stations. This would, for example, permit a cable system in a remote portion of a DMA (c.f. the Lee Vining, CA example, above) to compete against a DBS provider's broadcast offerings, even though the cable system cannot receive all of those broadcast stations over-the-air.

The caveats at the end of Points 4 and 5 are intended to close a potential loophole which could allow out-of-market stations to be delivered into markets into which networks have newly expanded.

In summary: the five point-definition suggested above would provide a better means to place broadcast stations, cable systems, and DBS operators all on an even competitive field when it comes to network television. The currently proposed definition for "significantly viewed" creates inequities in many locales when comparing DBS vs CATV vs over-the-air, either by making one mode of reception able to offer more selection than others, or by restricting the potential distribution new or specialty broadcast stations as compared to their older, more-established competitors.

Congress clearly intended to balance the ability for different broadcasters and service providers to compete with the need to protect broadcasters' copyrights. The five-point

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suggested definition of "significantly viewed" does a better job of satisfying intent than the current proposal.

The fact that a broader, self-adapting definition of "significantly viewed" should allow designations to change as the market expands and stations change, without direct intervention of the FCC, should prove attractive to the Commission.

D. Other enhancements suggested

While these go beyond the scope of the request for comments, I would like to take the opportunity to make a couple of suggestions to enhance the environment fostered by SHVERA:

1. Please consider explicitly permitting DBS services and CATV operators to redistribute AM and FM broadcast signals under essentially the same rules as those governing the redistribution of TV broadcast signals. The bandwidth required would be minimal as compared to HDTV signals; consumers would benefit from the improved accessibility and entertainment choices coming into their home over the wire; and broadcasters would be on a fairer footing to compete with satellite and cable offerings, hopefully preserving the ability of radio stations to function as viable businesses and hopefully encouraging radio broadcasters to maintain diversity of offerings, rather than continuing the current trend of homogenized programming devoid of local content.
2. SHVERA closed/restricted a loophole that many satellite service subscribers used to gain the ability to time-shift their television viewing. The rise of PVR's has reduced the need for that loophole, but I am concerned that my ability to be flexible in the times I choose to watch TV programming may be restricted with the advent of the broadcast flag. I would hope that the FCC will take steps in the future to protect consumers' flexibility in that regard, either by requiring second and third showings of material broadcast with the flag (perhaps on digital subchannels), or by requiring broadcasters to implement subsequent internet streaming of older broadcasts (to be compensated by a small fee, of course), or by permitting consumers to regain access to remote markets' broadcast stations (perhaps with a requirement to compensate local broadcasters for the perceived loss of potential advertising revenue).
3. The Commission relies on Nielsen, a private entity, to define the markets cited in SHVERA and other legislation. This creates a take-it-or-leave-it environment, with the public virtually powerless to point out shortcomings and arbitrary-ness in the definitions. Is this really wise? Can some sort of standard be imposed upon Nielsen or can the Commission use a separate, public algorithm to designate markets? I have specific concerns about the fairness of market boundaries being generally limited to county lines (e.g., northern Hartford County, CT is more closely related to Springfield than Hartford-New Haven), the illogic in some DMA assignments (e.g., Alpine County, CA being attached to the Los Angeles market, when Reno would be a much more logical assignment), and other oddities in more remote regions of the country (e.g. the Denver DMA "exclave" of Campbell and Johnson Counties, WY; wouldn't they be more logically attached to the Casper, Rapid City, or Billings markets?)(e.g.[2] the Zanesville, OH market, which is almost surrounded by the Columbus, OH market, probably to Zanesville's competitive disadvantage).

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I thank you for your time and consideration. If you wish clarification or discussion of any of these thoughts, please feel free to contact me.

Sincerely,

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